No. 622

In the Supreme Court of the United States

OCTOBER TERM 1941

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

A. H. BELO CORPORATION

POSITION OF RESPONDENT WITH RESPECT TO THE PETITION FOR CERTIORARI HEREIN.

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Respondent deems it desirable that certiorari be granted herein in order that a fanciful and dangerous construction of the Wage and Hour Act urged by petitioner herein may be rejected by the final authority of this court.

This case reaches this court at a time when the national welfare calls for every ounce of productivity that is in us. Yet petitioner asks this court to give sanction to a construction of the Act which is designed to "discourage" overtime work and so to limit work to forty hours a week, all considera-

tions of health, pay and well being of workers aside.[1]

Admittedly petitioner's attack upon the decision below stems solely from a desire to sustain a construction of the Act which will accomplish such design.

Prior to the Act respondent's editorial employees received weekly salaries for work which necessarily required fluctuating hours and overtime service. Such salaries were more than sufficient to satisfy the minimum standards of the Act when converted into hourly rates of pay. This was true whether the conversion be upon the minimum basis of one and one-half to one for the overtime hours or upon a higher than minimum basis of two to one or greater. The employees desired to retain the obvious benefits of uniformity of pay incident to the salary system. So the problem of compliance with the Act so far as respondent and its employees were concerned was merely the problem of converting the salary arrangement into hourly rates of pay, allocating the total pay between regular time and overtime in such wise as not to violate the prescribed minimum for regular time hours and the prescribed ratio of at least one and one-half to one for the overtime hours. The contracts in question made such an allocation, so much to regular time hours, based upon agreed

[1]Such design is best represented by a recent decision of a district court in Ohio, Williams v. General Mills, Inc., infra, where petitioner's theory is accepted in full flower.

regular rates of pay varying as to different employees from the minimum of 30¢ to over $1.00, and the balance to overtime hours, with provision for added payments whenever such balance was insufficient to cover all the overtime hours at the prescribed minimum ratio of one and one-half to one.

Thus pre-existing salary arrangements were adapted to the scheme of the Act by giving formal recognition, in terms of express ratio of pay, to a distinction between regular time pay and overtime pay which really already existed, though not in explicit terms, in the salary arrangements of respondent.[2]

The contracts in question do not present any question of substituting an "arbitrary" rate of pay for the "regular rate" specified in the Act, as claimed at page 2 of the petition for certiorari, or the use of an "arbitrary" divisor or "arbitrary" figure for regular rate of pay, as claimed at pages 4 and 7 of the petition, or any question of "evasion" of the Act, as claimed at page 9 of the petition, or the employment of any contractual "device" as claimed at page 10 of the petition.[3]

The issues suggested by the mentioned words, "arbitrary," "evasion," and "device," resolve themselves into fact questions which are forever settled by the harmonious findings of the courts below that "the contracts between employer and

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[2]See Note 6, page 8.

[3]See the findings of fact at R. 185-189 and 485-496.

employee were actual bona fide contracts of employment" (R. 488); that the contracts "were intended to, and did, really fix the regular rates at which each employee was employed" (R. 488); that the contracts were "real contracts for employment," not "fictitious," not "pretense" (R. 488); that "desiring to maintain and continue a system of fixed and regular weekly salaries in strict and full compliance with the Fair Labor Standards Act, employer and employees freely and voluntarily entered into agreements having that effect" (R. 494); that the "agreements fixed the regular rate of pay at which each was employed" (R. 494-495); that the agreements "are actual deliberate contracts intelligently made, and not mere bookkeeping or a scheme to evade" (R. 496); and that the guaranty provision of the agreements "is for the protection and benefit of the employee, the needs for whose living are constant whether his weekly work is or not * * * is made in good faith in the exercise of the right of free contract * * * it does not spoil the other terms of the contract and result in unintended liabilities that are inconsistent with the contract" (R. 496).

Petitioner does not claim that the contracts in question fail to satisfy all the objectives stated in the Act, i.e., maintaining a proper standard of health, pay and well being of the employees. If such are the objectives of the Act and if the language of the Act is to be construed in the light of

such objectives alone, the petitioner would concede that no law violation exists.

But petitioner finds a new and astonishing objective, not stated in the Act, for which court sanction is sought by the filing of petition for certiorari herein. Such supposed objective goes far beyond any congressional purpose as expressed in the Act itself or in the debates in Congress or in any public utterance of the proponents of the Act.

Worse, such supposed objective is square in the face of the needs of national defense upon which our very existence as a free people depends.

Such supposed objective is to discourage or prohibit work of over 40 hours a week, with design to "spread" employment, although the Nation's interest cries for more production, more work and longer hours, to the fullest possible extent consistent with maintenance of the standards of health and pay prescribed by the Act, and although admittedly, as in this case, no relationship exists between the design to reduce hours, on the one hand, and on the other hand, maintenance of the minimum labor standards with which the Act is concerned.*

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*Since the Act does not purport to be an emergency measure its objectives are to be tested in the light of permanent statesmanship for unlimited time. Congress was bound to know that periods of scarcity of labor, like the present, are to be expected no less than periods of unem-

The astonishing result of all out adoption of petitioner's construction is represented by a recent case from a district court in Ohio, not yet reported in Federal Supplement, *Williams v. General Mills, Inc.*, 4 Wage Hour Rept. 421, cited at page 9 of the petition for certiorari as presenting a conflict with the decision below.

In that case the employees, when the Act went into effect, were given the option of working 40 hours per week at 60c per hour or 56 hours per week at 52½c per hour for the first 40 hours and time and one-half for the added 16 hours. They chose the latter because such arrangement resulted in $9.60 added pay per week. Although, admittedly, such choice did no violence to the social objectives of the Act, and although, admittedly, as the court said, "very few men who have studied the problem contend that forty-eight hours or more of labor per week are detrimental to health," and although, admittedly, the pay received of 52½c an hour for the first 40 hours and time and one-half thereafter was far in excess of the minimum standard for health and well being expressed in the Act, such choice of longer hours was held to be "against public policy;" and the workers were

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ployment. Is it possible that Congress could have desired to limit work to forty hours for all time, whatever the national interest to the contrary? Is it possible that Congress would have done so without giving voice to such an objective somewhere in the Act?

actually condemned by the court as engaging in "a conspiracy between the men and the company against an Act of Congress—the men conspired to keep others out of work and the company to refrain from paying higher wages." This, as the court said, because "the big objective" of the Act is to "give work to more men—thus cutting down unemployment in general."

When the shortage in skilled labor is already critical, and when the true need is to find men, not work, the petitioner, and the Ohio court following petitioner's lead, find a "public policy" in the Act which forbids work of over 40 hours.

If 60 hours may be assumed to be a maximum that may be worked at utmost efficiency and without injury to health, the effect of petitioner's construction is to reduce our capacity for production by exactly one-third.

Unless the decision in the General Mills case is corrected on appeal to the Circuit Court of Appeals, it is important that it be repudiated by decision of this court at first opportunity.

The national interest requires no less.

Validity for the supposed objective of spreading work or the construction adopted by petitioner to accomplish such purpose is not to be found in the fact that petitioner conceives that such objective exists and applies such construction in administering the Act. This would be so even if peti-

tioner's construction of the Act in this respect had been more consistent than it has.[5]

Administrative action which supplies deficiencies or plugs holes in language in order to achieve a stated purpose of Congress is one thing. Administrative action which adds to the announced purposes of Congress some new and different objective, not expressed in the Act or even in the arguments of proponents of the Act, is another thing. However much effect may be given to administrative action of the first type, no warrant exists for attributing any consequence at all to action of the second type.

The technique by which petitioner applies his supposed objective of the Act is no less disrupting. His method is to force a dilemma upon employer and employees either to pay much higher wages after the Act than before for the same work, however sufficient the pay before the Act to satisfy all minimum standards and however implicit in such pay the maintenance of ratio of one and one-half to one for overtime hours,[6] and however

[5] See Missel v. Overnight Motor Transportation Co. (DC Md. 1941), 40 Fed. Supp. 174, pointing out prior inconsistent positions in this respect taken by petitioner and his predecessor in office.

[6] The Wage and Hour Act did not discover the relationship of one and one-half to one for overtime pay. Such relationship is so well settled as a long standing employment practice in American industry that it would seem that such relationship is implicit in most salary arrangements, whether or not the more than proportional addition to salary for anticipated extra long hours be expressed in the employment agreement in so many words.

impossible it may be for the employer to pay more, or, on the other hand, to cut the work week to 40 hours. Any escape from the dilemma is barred by petitioner's formula for ascertaining regular rate of pay. Such formula is offered as a substitute for pre-determination of rates of pay and precludes advance estimate of what will be due. Such formula requires that regular rate of pay be determined *after* the work is done by dividing the number of hours worked into the salary paid. Such ex posto facto determination of rate of pay must be employed even when it is not known, and cannot be known, whether the work will be so regular that the divisor will be uniform,[7] or whether the hours worked will be so irregular that a different divisor must be used for each week.[8]

Further, such formula, in distributing the total pay evenly among all the hours worked, assumes a per hour uniformity in compensation which is opposed to reality and actual intent of the parties, as well as their express agreement.

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[7] See Interpretative Bulletin No. 4, par. 11 (R. 399), for the method of computation when the number of hours worked is "regular."

[8] See Interpretative Bulletin No. 4, par. 12 (R. 399), for the method of computation when the number of hours worked is "irregular" or "fluctuating." Note the impossibility of determining as to work to be done in the future whether the weeks of fluctuating hours will be so few that the work will be deemed to be "regular hours," or so many that the work will be deemed to be "fluctuating hours."

Small wonder that petitioner's construction of the Act and technique of applying such construction, resulting, as it may, in bankruptive claims of liability, causes uncertainty and fright.

Except for the General Mills case, already mentioned as representing 100% adoption of petitioner's claim, and a similar decision from a district court in Georgia, *Fleming v. The Atlantic Co.*, 4 Wage Hour Rept. 353,[9] the cases cited in the petition for certiorari as presenting a conflict in decision are of three types, each quite distinguishable from the case at bar: (a) cases where the employment agreement clearly allocated salary payments to regular time, leaving the overtime uncompensated;[10] (b) cases where admittedly no agreement existed between employer and employee for allocating salary payments between regular time and overtime work and the court was faced with the necessity of making its own allocation;[11] and (c) cases where an agreement was

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[9]The opinion in this case, however, was withdrawn by the court on September 20, 1941, after preparation of the petition for writ of certiorari herein, and new opinion filed upholding the employment contracts in question.

[10]See Klotz v. Ippolito, S. D. Texas, July 21, 1941, 4 Wage Hour Rept. 444, cited at page 9 of the petition.

[11]See St. John v. Brown, N. D. Texas, 38 Fed. Supp. 385, cited at page 9 of the petition, where the court said: "Plaintiffs insist if, what defendants were paid can be allocated so as to cover the statutory minimum for the statutory maximum hours and, in addition, one and one-half for all overtime, that such a salary meets the requirements of

claimed by the employer to exist but circumstances of fraud or overreaching or duress or pretense rendered the agreement fictitious and without force.[12]

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the law. The proposition seems very plausible, but, *unless such was an arrangement agreed to by the parties*, my conclusion is, it is not a compliance * * * It is not enough that the salaries here, *independent of the working contract*, may be allocated or spread so as to have the minimum and one-half for overtime * * * The key to the right answer is the true per hour wage of the employee. *That must be determined, of course, by reference to the actual employment contract.*"

[12]See Fleming v. Carleton Screw Products Co., D. C. Minnesota, 37 Fed. Supp. 754, cited at page 9 of the petition. In such case it appeared that the employer was a manufacturer, whose employees worked regular shifts on an hourly pay basis without overtime pay before the Act went into effect. After the Act went into effect the employer reduced the hourly rate by 10c, a level reduction as to all employees, without distinction, and thereafter overtime was paid on the basis of the reduced rate, with agreement to maintain the total pay at the same figure as if the employee had worked at the previous hourly rate without overtime. Such plan was adopted by agreement but over the protest of some hostile employees. It was, therefore, not a case of converting a salary system into an hourly wage system, or a case where the objective was to maintain uniform weekly pay in spite of fluctuating hours to conform to the desires of employees, or a case of joint action and harmony of employees and employer. It was a case of continuing an already existing hourly wage system which already produced uniform total pay, without payment of overtime. Moreover, there was affirmative testimony from employees that "we really did not get a cut; it was only on the books we got the cut." Indeed, the court found that the agreements were signed by employees only after representations by the employer that

For the reasons mentioned, respondent urges that certiorari be granted herein to end, once and for all, the disruptive consequences of petitioner's claim.

Respectfully submitted,

LOCKE, LOCKE, DYER & PURNELL,

EUGENE P. LOCKE,

ADAIR DYER,

MAURICE L. PURNELL,

Attorneys for Appellee.

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amounted to a mild type of duress and that, in addition, such assurances were given that the previous hourly rate of pay would remain in effect in spite of the new plan that the true arrangement remained as before and the new rates were mere "artifice." Moreover the plan as submitted to the employees did not allocate any portion of the pay to overtime. Instead, the full pay was allocated to bring the total payment up to what the employee "had theretofore received at his straight time hourly rate." Thus the court was faced with substantially the same question as in the St. John case of what to do when the parties themselves have failed to agree upon an allocation between regular time and overtime.